TASMANIA
LAW REFORM
INSTITUTE

# Submission Template

## Review of the *Judicial Review Act 2000* (Tas)

This paper evaluates Tasmania's current laws governing the review of administrative decisions, and seeks community input on this topic. The paper is the first comprehensive review of the Act since it was introduced 18 years ago.

The Act covers the laws relating to when individual citizens may challenge the lawfulness of government action. There are concerns that the Act does not achieve its intended purpose of providing the public with a clear and simple means of seeking a review of government decisions.

Commonwealth legislation codifying judicial review was heralded as one of the most important legal reforms of the twentieth century. However, it is arguably the case that the Tasmanian legislation does not adequately manage the process or scope of review.

The Institute's evaluation of the law provides a unique opportunity to address these inadequacies and potentially ensure that this vital process is best serving Tasmanians.

The TLRI review of the Act will address a wide range of key topics, including the form that procedure for challenging government decisions should take, the jurisdiction of the courts, the types of decisions that should be reviewable, and the scope of that review. It will also examine the transfer of government power to private and not-for-profit organisations, as it pertains to the making of legally binding administrative decisions.

The Institute invites responses to any or all of the questions asked in the paper, and on any other matter considered relevant but not raised in the paper by **15 October 2018**.

**You can answer any or all of the questions and provide as little or as much information as you wish.**

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted.

- The form is designed to be completed electronically by entering responses. The space provided for your answer will expand (if necessary) as you type. You are invited to include as much or as little information as you choose.

- Alternatively, you may print out the form and either fill it in manually or use a separate answer sheet (if you use a separate answer sheet, please ensure that you clearly number your answers to correspond with the questions in the Issues Paper). Again, you are invited to include as much or as little information as you choose.

After you have completed your submission please either email or post the document to the Institute:

**Email**: law.reform@utas.edu.au

**Post**: Tasmania Law Reform Institute

Private Bag 89
Hobart TAS 7001

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

# Personal Information

**Name**

**Organisation (if any)**

**Address**

**Email**

**Phone number**

# Publication of Submissions

The Institute uses any submissions received to inform its research. Submissions may be referred to or quoted from in a final report which will be published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

**Therefore, when making a submission to the Institute, please tick the applicable box to identify how you would like it to be treated based on the following categories:**

☐ Public submission – the Institute may refer to or quote directly from my submission, and name me as the source of the submission in relevant publications.

☐ Anonymous submission – the Institute may refer to or quote directly from my submission in relevant publications, but will not identify me as the source of the submission.

☐ Confidential submission – the Institute will not refer to or quote directly from the submission, but may aggregate information in your submission with other submissions for inclusion in any report or publication. Confidential submissions will only be used to inform the Institute generally in its deliberations of the particular issue under investigation, and /or provide publishable aggregated statistical data.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time, by contacting Kira White on (03) 6226 2069 or email Law.Reform@utas.edu.au. You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

## QUESTIONS

| **Question 1** |
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| (a) Is it sensible and feasible to abolish the prerogative remedies? How could this best be done? Do the advantages of doing so outweigh the disadvantages?<br>(b) Is it more sensible and feasible to retain the prerogative remedies? What are the advantages and disadvantages of doing so?<br>(c) If so, how is this best done — by incorporation into the *JRA* or by being kept separate? What are the advantages and disadvantages of the two options? |

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| **Question 2** |
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| If it is decided to keep the prerogative remedies separate from the *JRA*, is it necessary to put them on a stronger legal footing by embodying them in legislation? Or is their current basis sufficient? |

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| **Question 3** |
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| Should the definition of decision be broadened to include a decision or action that is necessary for the implementation of a statutory provision which operates to change the legal position of a person without any administrator having to make a decision so that such decisions are reviewable? If so, how should such a definition be worded? |
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**Question 4**

(a) Is there a danger that the *JRA* will be used to bring premature or disruptive applications for review? If so, what is the best method of guarding against the danger — limiting the type of challenges which can be brought so as to rule out challenges which are premature and disruptive or giving the courts a discretion to rule out premature and disruptive challenges? Or do we need both methods?

(b) Should all decisions of an administrative character made under an enactment count as decisions for the purposes of the *JRA*? Or should they have some additional characteristics such as being 'final and operative' so that decisions made early in an administrative process are not reviewable, making premature and disruptive challenges more difficult?

(c) If courts should have a discretion to rule out premature and disruptive challenges, should the concept of decision under an enactment be amended to include a decision made in the course of a proceeding under an enactment whether or not the decision is substantive or procedural, final and operative or required by the enactment?

| **Question 5** |
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| Should the definition of enactment in s 3 of the *JRA* be amended to include instruments as well as statutory rules to ensure that the definition covers planning provisions and schemes? Should a specific provision be added to the definition to make it clear that local government rules and by-laws are enactments although they are not statutory rules? |

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| **Question 6** |
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| Is the source of power approach the appropriate approach for determining whether a decision is made under an enactment? |

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**Question 7**

Where there is more than one source of the legal power to make a decision, and one source of power is an enactment, in what circumstances should the decision be considered as made under an enactment for the purposes of the *JRA*?

| **Question 8** |
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| Should there be judicial review of decisions made with respect to:<br>• Tenders and procurement contracts?<br>• Contracts of employment?<br>• Contracts and other arrangements entered into in the implementation of a policy, or to deliver a service or benefit? |

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| **Question 9** |
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| Should a decision made in pursuance of an enactment which affects interests but does not affect anyone's rights or obligations be a decision under an enactment? |

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| **Question 10** |
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| Should a decision made under the general law but given effect to by statute be reviewable? |

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| **Question 11** |
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| Are there classes of legislation which should not be considered as an enactment for the purposes of the *JRA*? |

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**Question 12**

(a) Should the scope of the *JRA* be extended to cover administrative and governmental decisions whether made under an enactment or not?

(b) Should the *JRA* be extended to permit review of all decisions of an administrative or public nature?

(c) Should the *JRA* be amended to permit review of all decisions of government officers, servants, agents, agencies and service providers?

(d) Should the *JRA* be amended to permit review of all decisions which are subject to the requirements of natural justice?

(e) Should judicial review under the *JRA* be extended to all decisions and conduct made in the exercise of public power, regardless of its source?

**Question 13**

(a) If the scope of the *JRA* is extended to all decisions made in the exercise of public power, should that grant replace or be in addition to the existing grant of power and others suggested in the above discussion?

(b) Should the general grant of jurisdiction over all exercises of public power include but not be limited to jurisdiction with respect to the other more specific grants of jurisdiction which currently exist and which are proposed in this Issues Paper?